

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ESTEBAN RAMIREZ-MELGOZE,
MARTHA A RAMIREZ,

Plaintiffs-Appellants,

v.

COUNTRYWIDE HOME LOAN
SERVICING LP, RECONTRUST
COMPANY NA,

Defendants-Appellees.

NO. CV-10-0049-LRS

(Bankruptcy Case No. 09-00801-
PCW13; Adversary No. 09-80101-
PCW)

**ORDER DENYING PLAINTIFFS'
MOTION TO APPEAL ORDER
DISMISSING ADVERSARY
PROCEEDING**

BEFORE THE COURT is Appellants-Plaintiffs' Appeal of the Bankruptcy Court's Order Dismissing Appellants' Adversary Proceeding Following Appellees' Motion to Dismiss for Failure to State a Claim (Ct. Rec. 1) filed February 24, 2010 and noted without oral argument for October 4, 2010, by agreement of the parties. Appellants appealed two orders of the Bankruptcy Court: 1) Order Granting Defendants' Motion to Dismiss entered in the adversary proceeding on February 18, 2010; and 2) Order Denying Plaintiff's Motion for Summary Judgment entered in the adversary proceeding on February 18, 2010. This Court has already denied Appellants' Motion for Leave to Appeal Order Denying Motion for Summary Judgment in its Amended Order entered on July 29, 2010 (Ct. Rec. 31).

1 The only matter left before this Court is Appellants' appeal of the
2 bankruptcy Court's order dismissing Appellants' adversary proceeding
3 following Appellees' motion to dismiss for failure to state a claim.

4 **I. SUMMARY OF FACTS**

5 On or about August 8, 2004, Esteban and Martha Ramirez
6 ("Appellants") entered into a Lease Option to Purchase Contract
7 ("Option Contract") with William and Kyna Easter ("Easters" or
8 "Borrowers"), whereby Appellants rented the property commonly
9 described as 201 3rd Street South, Brewster, Washington 98812
10 ("Property") with the option to purchase the Property. Appellants
11 failed to properly record their interests under the Option Contract.

12 The Easters subsequently executed a promissory note in favor of
13 America's Wholesale Lender in the amount of \$84,150.00 ("Note") on or
14 around March 1, 2006. The Note was secured by a Deed of Trust
15 encumbering the Property. America's Wholesale Lender was not aware of
16 Appellants' interest in the Property at the time the Easters executed
17 the Note and Deed of Trust due to Appellants' failure to record their
18 interests under the Option Contract.

19 Appellee Countrywide Home Loans, Inc. was "doing business as" and
20 operating under the name of America's Wholesale Lender at the time the
21 Easters originated the loan. On or about August 30, 2006, Countrywide
22 Home Loans, Inc., doing business as America's Wholesale Lender,
23 indorsed the Note in blank. On or around April 26, 2007, upon learning
24 that the Easters had encumbered the Property, Appellants filed a state
25 court action against the Easters in Okanogan County Superior Court
26 under cause number 07-2-00184-2 ("Okanogan Litigation").

1 On July 27, 2007, the Easters filed a Chapter 7 bankruptcy
2 petition in the United States Bankruptcy Court, Western District of
3 Washington, under cause number 07-13476-SJS. Appellants filed a
4 bankruptcy adversary case against the Easters ("Easter Adversary
5 Litigation"). On or around August 15, 2008, the parties entered into
6 a Settlement Agreement in order to resolve all of the disputes arising
7 from the Okanogan County and Easter Adversary Litigation. Pursuant to
8 the terms of the Settlement Agreement, the Property at issue was
9 deeded to Appellants. Countrywide Home Loans, Inc. was permitted to
10 proceed with foreclosure action in the event the loan was not paid in
11 full within 14 days. Countrywide Home Loans, Inc. agreed to the 14
12 day delay in order to allow Appellants an opportunity to seek
13 alternate financing and pay off the entire obligation owed by William
14 and Kyna Easter.

15 On November 19, 2008, and as a direct result of Appellants' and
16 Borrowers' failure to satisfy the Easter obligation in full,
17 Countrywide Home Loans, Inc., through its appointed trustee, Appellee
18 ReconTrust Company, N.A., caused a Notice of Trustee's sale to be
19 recorded. The Trustee's sale was scheduled to occur on February 20,
20 2009.

21 In November of 2008, Corporation Service Company, located at 202
22 North Phoenix Street, Olympia, WA 98506, served as ReconTrust Company,
23 N.A.'s registered agent in Washington. After November 2008, ReconTrust
24 Company, N.A. undertook a project to change its Washington registered
25 agent to CT Corporation System, located at 1801 West Bay Drive NW, Ste
26 205, Olympia, WA 98502. Effective February 1, 2009, CT Corporation

1 System became ReconTrust Company, N.A.'s registered agent in
2 Washington.

3 On February 20, 2009, the date scheduled for the Trustee's sale,
4 Appellants filed a Chapter 13 bankruptcy petition in the United
5 States Bankruptcy Court, Eastern District of Washington, under cause
6 number 09-00801. At the time of the bankruptcy filing, the Easter loan
7 was contractually due for the April 1, 2007 payment. The pre-petition
8 arrears totaled \$22,612.33. Appellants filed a Chapter 13 plan which
9 proposed to cure the delinquency owed on the Easter Note and maintain
10 the Easter's ongoing loan payments. Countrywide Home Loans Servicing,
11 LP filed a proof of claim in order to object to Appellants' Chapter 13
12 plan.

13 On April 27, 2009, and subsequent to the filing of Appellants'
14 Chapter 13 petition, Bank of America, N.A. acquired Countrywide Bank,
15 FSB, its affiliates and subsidiaries. As a result, "Countrywide Home
16 Loans Servicing, LP" underwent a name change and began operating as
17 "BAC Home Loans Servicing, LP."

18 **II. SUMMARY OF ARGUMENTS**

19 **A. Appellants' Argument**

20 Appellants allege that Appellees are liable for violations of the
21 Washington Deed of Trust Act and Unfair Business Practices Act as a
22 result of Appellees' non-communicative policies and alleged failure to
23 act impartially in the administration of the Easter loan. More
24 specifically, Appellants assert that Appellees' "conduct and non-
25 communication policies" impaired their right to cure the Easter loan
26 delinquency in violation of the Washington Deed of Trust Act.

1 Appellants contend that they qualify as "successors" of the Easters
2 because they became liable for the Easter obligation under the
3 Settlement Agreement. In essence, Appellants argue that they qualify
4 as the Easters' "successor" because they succeeded the Easters in
5 ownership. Appellants contend that it is unreasonable to allow a
6 junior lien holder to cure a payment deficiency owing on a third
7 party's loan, while denying this right to a party like Appellant
8 Ramirez.

9 Appellants allege that ReconTrust Company, N.A. breached its duty
10 of impartiality by failing to maintain a local office and phone
11 number, as required by R.C.W. 61.24.030(6). Appellants also argue
12 that there was "considerable confusion about the identity of the
13 Trustee, because "'Recontrust' can be either Recontrust, Inc, a Nevada
14 Corporation; or Recontrust NA, a Banking Association." Similarly,
15 Appellants allege that "the legal identity of the noteholder, which
16 turned out to [be] BAC Home Loans Servicing, LP, remained a mystery
17 until after creditor's claim was filed in the bankruptcy. Up to that
18 point Ramirez reasonably believed [the] noteholder to be Countrywide
19 Home Loans, Inc."

20 Appellants allege that Appellees are liable for "Unfair Business
21 Practices" due to Appellees' "non communication policy." Appellants
22 also allege that Appellees prepared certain unspecified documents and
23 such documents were prepared by "persons practicing law without a
24 license."

1 Finally, Appellants assert that Appellees' conduct impaired their
2 ability to effectively restrain the Trustee's sale scheduled for
3 February 2009.

4 B. Appellees' Argument

5 Appellees argue that Appellants fail to state a claim upon which
6 relief may be granted as to their claims for violations of the
7 Washington Deed of Trust Act and Unfair Business Practices Act.
8 Appellees assert that the Bankruptcy Court correctly concluded that
9 Appellees' actions "did not deprive the [Appellants], nor prevent the
10 [Appellants] from exercising any legal rights related to the
11 foreclosure. Even though the [Appellees'] contact [sic] may have
12 precluded the [Appellants] from curing the delinquency under the note,
13 the [Appellants] had no right to do so under state law."

14 Appellees argued that Appellants did not qualify as a borrower,
15 grantor, a beneficiary under a subordinate deed of trust, or a person
16 having a subordinate lien or encumbrance of record on the Property.
17 Further, Appellees assert that as a "third party" to the Easter loan,
18 state law did not afford Appellants the right to cure the loan
19 delinquency in order to stop the foreclosure sale. Appellees rely on
20 the Washington Deed of Trust Act which provides that only a "borrower,
21 grantor, any guarantor, any beneficiary under a subordinate deed of
22 trust, or any person having a subordinate lien or encumbrance of
23 record on the trust property or any part thereof" may cause a
24 discontinuance of a Trustee sale by curing the default. R.C.W.
25 61.24.090.

1 Appellees argue that Appellants do not qualify as a "Borrower" as
2 that term is defined by the Deed of Trust Act because Appellants are
3 not liable for the obligation owed by the Easters. Therefore,
4 Appellants did not have the right to cure the payment deficiency on
5 the Easter loan under R.C.W. 61.24.090. Similarly, Appellants are not
6 similarly situated to a junior lien holder. Whereas a hypothetical
7 junior lien holder would have a valid, recorded interest in the
8 Property, Appellants did not.

9 Appellees explain that the Settlement Agreement imposed no
10 liability on Appellants. Under the terms of the Settlement Agreement,
11 Countrywide Home Loans, Inc. allowed Appellants a fourteen day window
12 of opportunity to refinance the loan in its entirety. Thereafter,
13 Appellees could proceed with foreclosure. This agreement can be
14 distinguished from an actual assumption of the loan, which would have
15 imposed personal liability on Appellants for the Easter obligation.
16 Neither Countrywide Home Loans, Inc. nor its successors, as part of
17 the Settlement Agreement or under any other circumstance, consented to
18 assumption of the Easter Loan by Appellants. The Appellants never
19 assumed the obligations of the Note. Appellees argue that there is no
20 contractual relationship which would render Appellants liable for
21 performance under the Easter Note.

22 Appellees argue that instead of refinancing the loan, Appellants
23 filed a bankruptcy petition and submitted a Chapter 13 plan in an
24 effort to force a loan modification. Countrywide Home Loans Servicing,
25 LP filed a proof of claim to preserve its interests and objected to
26 Appellants' plan, which proposed to maintain the ongoing monthly

1 payments owed by the Easters. This conduct indicates, Appellees
2 contend, that Countrywide Home Loans, Inc. and its successors never
3 intended for the Settlement Agreement to operate as a formal loan
4 assumption. Appellees point out that a formal loan assumption would
5 have required a written contract. Appellants have failed to produce a
6 writing which memorializes a formal loan assumption. Finally, from
7 the public policy standpoint, Appellees argue that there is a
8 compelling need to protect lenders from "strangers" to a loan
9 based on privacy considerations, principles of freedom of contract,
10 and fairness and stability in the marketplace. Lenders should not be
11 forced into contractual relationships with parties with whom they have
12 no desire to transact business.

13 Appellees further argue that ReconTrust Company, N.A. did not
14 breach any duty of impartiality in the administration of the Easter
15 Loan. Appellees concede that the Deed of Trust Act, as it applied in
16 November of 2008, imposed a duty on the Trustee to act "impartially
17 between the borrower, grantor, and the beneficiary." Wash. Rev. Code
18 Ann. 61.24.010 (4) (West 2008). Appellants fail, however, to qualify
19 as a borrower, grantor or beneficiary so ReconTrust Company, N.A. owed
20 no duty of impartiality to Appellants.

21 The last argument that Appellees raise before this Court is that
22 their conduct did not impair Appellants' ability to restrain the
23 foreclosure sale in February 2009. In fact, Appellees point out,
24 Appellants obtained an order restraining the sale and the February
25 2009 sale was effectively restrained. Appellees state that because
26 Appellants had no right to tender the payment deficiency pursuant to

1 R.C.W. 61.24.090, Appellants were not deprived of any legal right as a
2 result of ReconTrust Company N.A. changing its registered agent prior
3 to the foreclosure sale. Moreover, although Appellants argue that
4 Corporation Service Company failed to maintain a local phone number,
5 Appellants have introduced no evidence to support this contention.¹ As
6 occupants of the Property, Appellants only had a right to receive
7 notice of the trustee's sale, which they received.

8 As to Appellants' argument below that there existed "considerable
9 confusion about the identity of the Trustee," Appellees respond that
10 Appellants are simply trying to create an ambiguity where none exists.
11 Appellees state that the foreclosing Trustee was identified as
12 ReconTrust, Company, N.A. on the Notice of Trustee's sale. Nowhere
13 does the Notice of Trustee's sale mention "ReconTrust, Inc., a
14 Nevada Corporation." Additionally, the recorded Appointment of
15 Successor Trustee also identifies "ReconTrust Company, N.A." as the
16 successor trustee.

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19 ¹Appellees explain that the allegation regarding failure to maintain
20 a local phone number is based on Appellants' inability to contact one of
21 ReconTrust Company, N.A.'s representatives in order to cure the payment
22 deficiency on the Easter loan prior to the scheduled foreclosure sale.
23 Appellees explain that Appellants were allegedly disconnected after
24 ReconTrust Company, N.A.'s representatives learned that Appellants and
25 their counsel were not the original borrowers.
26

1 Appellees also address Appellants' claim that confusion existed
2 as to the legal identity of the noteholder. Appellees argue that as a
3 stranger to the loan, Appellants lack standing to raise any arguments
4 relating to the Note. Thus, Appellants fail to state a claim upon
5 which relief may be granted.

6 With respect to Appellants' Unfair Business Practices claim
7 regarding "non communication" and refusal to disclose information on
8 the Easter Loan to Appellants, Appellees respond that: 1) Appellants
9 cannot maintain an action for "unfair business practices" related to a
10 loan under which Appellants were never a party; 2) the Gramm-Leach-
11 Bliley Act ("GLBA") prohibits financial institutions from disclosing
12 information on a customer's loan to a third party pursuant to 15
13 U.S.C. §6801, etc. seq. Appellees conclude Appellants lack the
14 requisite standing to bring a claim for Unfair Business Practices in
15 relation to a loan under which Appellants were never a party and had
16 not assumed. Appellees also did not owe Appellants any duty to
17 provide access to the Easter account information or an opportunity to
18 cure the payment deficiency telephonically, or otherwise.

19 With respect to Appellants' allegation that documents were
20 prepared by persons unauthorized to practice law, raised for the first
21 time on appeal, Appellees note that Appellants fail to specify which
22 documents were prepared by persons unauthorized and any authority in
23 support of their allegation. Appellees note, however, that Appellants
24 are not a party to the loan at issue, and thus lack standing to raise
25 any issues regarding the administration of the loan.

1 As for Appellants' claim that Appellees' conduct impaired
2 Appellants' ability to restrain the Trustee's sale, Appellees assert
3 that this claim is without merit. Appellants obtained an order
4 restraining the sale and the February 2009 sale did not take place. In
5 conclusion, Appellees state that Appellants have come to federal court
6 in an attempt to force a modification of a Note and Deed of Trust
7 under which Appellants were never a party. To force such a
8 modification and compel the substitution of the original obligors for
9 a third party would defy all principles of freedom of contract.

10 **III. BANKRUPTCY COURT FINDINGS**

11 The Bankruptcy Court concluded that Appellees' actions "did not
12 deprive the [Appellants], nor prevent the [Appellants] from exercising
13 any legal rights related to the foreclosure. Even though the
14 [Appellees'] contact [sic] may have precluded the [Appellants] from
15 curing the delinquency under the note, the [Appellants] had no right
16 to do so under state law." The Bankruptcy Court held that Appellants
17 did not qualify as "successors" because they did not assume the Easter
18 Note. The Bankruptcy Court construed "successor" under R.C.W.
19 61.24.005(6) to mean "successor in liability" as to the obligation
20 secured by the Deed of Trust, not "successor in title" as to the
21 property serving as the security.

22 The Bankruptcy Court held that because Appellants did not qualify
23 as the "successors" to the Easters in accordance with state law, and
24 they did not have the right to cure the payment deficiency on the
25 Easter loan. The court reasoned:

1 [i]f state law did provide that, then the holder
2 of a note secured by a deed of trust would be
3 required to accept cure from any party who is a
4 stranger to the underlying transaction, payment
5 from a party against whom the note could not be
6 legally enforced. No holders and beneficiaries
7 would [sic] be required to deal on a long term
8 basis under the note with strangers to the
9 underlying transaction who had not assumed any
10 liability in the transaction, and state law simply
11 doesn't mandate that result.

12 The Bankruptcy Court held "[t]he [Appellants] are not liable
13 under the note. The note cannot be enforced against them by the
14 holder. They are not successors to the borrower as there is no written
15 agreement with the beneficiary by which the plaintiff assumed
16 liability under the note." The Bankruptcy Court held that Appellants
17 failed to qualify as a borrower or grantor and did not qualify as a
18 beneficiary.

19 The Bankruptcy Court also concluded that "Recon Trust [Company]
20 N.A., did maintain a registered agent and physical address in this
21 state. Whether or not it was required to do so under state law, it
22 complied with this requirement."

23 **IV. ANALYSIS**

24 **A. Standard of Appellate Review**

25 A bankruptcy court's findings of fact are reviewed for clear
26 error and its conclusions of law are reviewed de novo on appeal. *In re*
Fowler, 394 F.3d 1208, 1212 (9th Cir. 2005); Fed. R. Bankr. P. 8013.

27 **B. Bankruptcy Court Did Not Err in Finding that Appellants** 28 **Failed to State a Claim Upon Which Relief May be Granted as** 29 **to Appellants' Claims for Violations of the Deed of Trust** 30 **Act and Unfair Business Practices Act**

1 To support this construction, the Bankruptcy court reasoned that
2 the Deed of Trust Act provides an additional list of parties who are
3 entitled to receive notice of the trustee's sale pursuant to R.C.W.
4 61.24.040. In addition to the "grantor," R.C.W. 61.24.040(b)(iii)
5 provides that both a "vendee in any real estate contract" and "holder
6 of any conveyances . . . in any portion or all of the property . . .
7 recorded after the recordation of the deed of trust being foreclosed"
8 must receive notice of the trustee's sale. Appellants qualified as a
9 party entitled to receive notice of the sale under R.C.W.
10 61.24.040(b)(iii), which Appellants received. However, entitlement to
11 receive notice is fundamentally different than entitlement to cure a
12 default and the Deed of Trust Act commits separate sections to each
13 action.

14 This Court agrees with the Bankruptcy Court's reasoning. As
15 Appellees note, the legislature would not have provided an additional,
16 separate list of parties entitled to receive notice of the sale, which
17 includes parties similarly situated to Appellants, if the term
18 "grantor" already encompassed the grantor's "successors in title." If
19 so, the inclusion of the parties described in R.C.W. 61.24.040(b)(iii)
20 would be redundant. Moreover, the definition of "successor" under
21 R.C.W. 61.24.005(6) is limited to the successor in liability on the
22 loan because a deed of trust is executed to serve as security for the
23 performance of the borrower's obligations under the loan. It would be
24 illogical to extend the definition of "successor" to a party which had
25 no liability on the underlying obligation. In limiting the definition
26 of "successor" to "successors in liability," the lender is protected

1 from strangers to the loan. The Bankruptcy Court's construction of
2 the term "successor" under R.C.W. 61.24.005(3) and R.C.W. 61.24.005(6)
3 was reasonable given the foregoing public policy considerations raised
4 by Appellees.

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8 C. Bankruptcy Court Did Not Err in Finding Appellees' Conduct
9 Did Not Impair Appellants' Ability to Restrain the Trustee's
10 Sale When Appellants Obtained an Order Restraining the Sale
11 and the Trustee's Scheduled Sale for February 20, 2009 Did
12 Not Occur

13 As for Appellants' contention that the registered agent
14 requirements were not followed, this Court finds that the Bankruptcy
15 Court properly concluded that ReconTrust complied with the requirement
16 to maintain a registered agent in this state. The Notice of Trustee
17 Sale identified the local agent for service of process as "Corporation
18 Services Company, 202 North Phoenix Street, Olympia, WA 98506." This
19 appears to have been the correct name and address for ReconTrust
20 Company, N.A.'s registered agent in November 2008, at the time the
21 Notice of Trustee Sale was executed and recorded. Though the
22 registered agent for ReconTrust Company, N.A. changed to CT
23 Corporation Systems, effective February 1, 2009, ReconTrust Company,
24 N.A. maintained a registered agent and physical presence in Washington
25 at all relevant times and was thus in compliance with R.C.W.
26 61.24.030(6).² This Court agrees with the Bankruptcy Court which

²R.C.W. 61.24.030(6) provides:

1 found that Appellants' legal rights were not impaired as a result of
2 ReconTrust Company, N.A. changing its registered agent.

3 Finally, this Court finds that Appellees owed no duty of
4 impartiality to Appellants, therefore, Appellants' allegation that
5 ReconTrust Company, N.A. breached a duty of impartiality fails to
6 state a claim upon which relief may be granted. Even if Appellants
7 were such a party to whom a duty was owed, the Bankruptcy Court
8 correctly found that "Plaintiffs' right to effectively restrain the
9 trustee's sale had not impaired because Plaintiffs did obtain an order
10 which purportedly restrained the sale . . .". Regardless of
11 whether service of the application for the restraining order was
12 effectuated in a manner consistent with state law, the record
13 establishes that Appellants accepted service of process by mail.
14 Appellees' counsel sent Appellants' attorney confirmation that the
15 sale would be postponed.³ Clearly Appellees' conduct did not impair
16 Appellants' ability to restrain the Trustee's sale.

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18 That prior to the date of the notice of trustee's sale and
19 continuing thereafter through the date of the trustee's sale,
20 the trustee must maintain a street address in this state where
21 personal service of process may be made, and the trustee must
22 maintain a physical presence and have telephone service at such
23 address.

24 ³Appellants contend that the Order Conditionally Restraining Sale
25 was "defective on its face" and "could not be enforced" because R.C.W.
26 61.24.130(2) requires that notice of the application for a restraining
order be served on the Trustee, not just mailed.

V. CONCLUSION

Based upon the reasons and authorities cited above, **IT IS HEREBY ORDERED** that Appellants' complaint fails to state any claim upon which relief may be granted and this Court affirms the Bankruptcy Court's order and **dismisses Appellants' case with prejudice.**

IT IS SO ORDERED. The District Court Executive is directed to enter this order, enter judgment accordingly, provide copies to counsel and the Clerk of the Bankruptcy Court, and CLOSE FILE.

DATED this 8th day of November, 2010.

s/Lonny R. Suko

LONNY R. SUKO
Chief United States District Judge